UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------------------------------X

DAVID NORKIN,

Plaintiff, Case No. 05 CV 9137 (DC)

-against-

DLA PIPER RUDNICK GRAY CARY, LLP,

Defendant.

----------------------------------X

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

This Memorandum is submitted in opposition to the motion by defendant DLA Piper Rudnick Gray Cary, LLP ("Piper") to dismiss this action pursuant to Fed.R.Civ.P. 12(b)(6) or in the alternative, for summary judgment pursuant to Fed.R.Civ.P. 56.

Although the motion seeks relief under Rule 12(b)(6), defendant's motion papers do not contain any claim that the Complaint is legally insufficient on its face. Rather, defendant alleges facts outside the four corners of the Complaint which it claims are undisputed, and which it claims entitle it to dismissal at this pre-Answer, pre-discovery phase of the litigation. Defendant is wrong in every respect.

1. Defendant's claim that the causes of action asserted in the Complaint belong to plaintiff's bankruptcy trustee: As shown below, plaintiff's claim for damages relates to his loss of post-bankruptcy filing wages and other benefits, a category of damages

expressly excluded from the bankruptcy estate by statute and by case law.

2. Defendant's claim that it was not plaintiff's attorney: Plaintiff has submitted no affidavit by anyone with knowledge of the facts in support of this claim and has not denied that it offered personal legal advice to plaintiff. Defendant relies exclusively on statements made by plaintiff in a deposition in another litigation. As shown below, and in the annexed affidavit of Mr. Norkin, these statements were taken out of context and are not inconsistent with plaintiff's claim in this case that defendant represented him personally. The issue of whether an attorney/client relationship involves questions of fact to be decided at trial, or, at a minimum, following discovery.

3. Defendant's claim that its negligent failure to advise plaintiff of a settlement offer did not give rise to liability at bar: Defendant claims that because plaintiff rejected an offer from ABB in January 2001, plaintiff would have rejected the same offer in March 2002, had defendant disclosed the offer to plaintiff. As shown in the accompanying affidavit of plaintiff, there was a material change in circumstances in the interim, and plaintiff would have accepted the offer in 2002 had he known about it.

Summary of the Complaint

From 1983 until May 2002, plaintiff David Norkin was the President and sole beneficial shareholder of Britestarr Homes, Inc. (Complaint, ¶1). Britestarr was the owner of some 28 acres of real property in the Bronx, which it sought to sell for development as a power plant project (Complaint, ¶2-3). In 1988, Britestarr entered into an option agreement with ABB Equity Ventures ("ABB"), a developer, giving ABB an exclusive three year option to purchase the site (Complaint, ¶4-6). The purchase price was a minimum of $31.4 million (Complaint, ¶7).

In the spring of 1999, plaintiff retained defendant Piper to assist him and Britestarr in advancing the transaction with ABB (Complaint, ¶8).

During the option period, Britestarr defaulted on payment of a loan from Lloyds Bank which had been obtained in connection with its purchase of the Bronx property. ABB purchased the Lloyds claim, including Lloyds' interest in the stock of Britestarr which had been pledged in connection with the loan. At the time of the original loan, the stock had been in the name of Norkin's former wife, Friema, but the stock had been transferred to Norkin in connection with the parties' divorce (Complaint, ¶14-15).

ABB commenced litigation to acquire title to the stock and for other relief. In this connection, Piper represented

Britestarr but also rendered personal advice to Norkin with respect to his ownership of the shares (Complaint, ¶16).

In the spring of 2002, in the course of the litigation, ABB conveyed to Piper an offer to pay more than $1 million to extend the option period for 18-20 months. Acceptance of the offer would have enabled Norkin to settle ABB's claims for the ownership of the shares and would have given Britestarr an additional $1 million with which to operate in the future without the need for bankruptcy.

Piper failed to advise Norkin or Britestarr of this offer (Complaint, ¶).

Rather than inform Norkin of ABB's offer, Piper instead advised Britestarr to file for bankruptcy and also advised Norkin to resign as Britestarr's President. The ostensible reason for this was that it would facilitate the sale of the Bronx property through the bankruptcy (Complaint, ¶19, 20). This advice was erroneous, particularly since acceptance of ABB's offer would have allowed Britestarr to avoid bankruptcy and would have allowed Norkin to remain as Britestarr's President.

Piper's legal advice to Norkin to resign his position as Britestarr's President caused him to lose his right to obtain a salary and other benefits as President (Complaint, ¶23).

Unbeknownst to plaintiff, at the time Piper was representing plaintiff and Britestarr, Piper was operating under a conflict of interest which it had never disclosed to plaintiff. Specifically, Piper was simultaneously serving as project counsel for a competing power plant project. Piper stood to receive significantly larger legal fees as project counsel for the competing project than it would receive as landowner's counsel in the Bronx project (Complaint, ¶26).

Plaintiff's first cause of action alleges a breach of fiduciary duty by Piper in that it (a) represented a competing power plant project, and failed to advise plaintiff of that conflict; and (b) failed to advise Norkin of ABB's March 2002 settlement offer which would have left Norkin as Britestarr's President and resolved the ownership dispute.

Plaintiff's second cause of action alleges negligence in the representation of plaintiff individually in that Piper (a) advised plaintiff to resign as Britestarr's President rather than advising Norkin and Britestarr to accept ABB's offer; and (b) failed even to advise Mr. Norkin of the settlement proposal. Plaintiff is seeking with respect to each cause of action damages "in excess of $10 million, including the right to receive salary as Britestarr's President." (Complaint, ¶30 and 34).

Argument

I.

PLAINTIFF'S MALPRACTICE CLAIM AND HIS CLAIM FOR DAMAGES RESULTING FROM LOSS OF HIS POSITION AS PRESIDENT OF BRITESTARR DO NOT BELONG TO HIS BANKRUPTCY ESTATE

Defendant, taking significant liberties with the Complaint, characterizes the claim as one for damages resulting from the loss of the value of plaintiff's Britestarr stock. Defendant then claims that since the stock belonged to plaintiff's bankruptcy estate, any such cause of action would similarly belong to the estate and could be pursued only by the trustee.

The short answer to defendant's claim is that plaintiff is not seeking in this action damages resulting from the loss of plaintiff's ownership of Britestarr stock[1].

Plaintiff's damage claim in this case, is based on lost income and other benefits resulting frm his resignation -- in reliance on defendant's advice -- as President of Britestarr. These damages are expressly excluded by both statute and by case law from the bankruptcy estate. Specifically, 11 U.S.C. §541 defines the assets which are part of a bankruptcy estate to include

[1] Although the malpractice at bar occurred following the filing of plaintiff's bankruptcy petition, and therefore, the cause of action belongs to plaintiff, plaintiff acknowledges that the stock is an asset of the estate and therefore, it is the trustee's prerogative to sue for damages resulting from the loss of the stock.

"...all legal or equitable interest in the debtor and property as of the commencement of the case." (Emphasis added). These include "proceeds, product, offspring, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case." (11 U.S.C. §541(a)(6). See, also, e.g., Young v. Butler, 308 B.R. 1 (Bankr. Ct. S.D.N.Y. 2004); Ackerman v. Schultz, 250 B.R. 22, 29 (Bankr. Ct. E.D.N.Y. 2000).

It is undisputed that Mr. Norkin filed for bankruptcy in 1997, some four and a half years prior to the event of the claims asserted in this case. (See accompanying affidavit of David Norkin). Although the case was not converted to a Chapter 7 case until May 2002, it is the date of the original filing which governs for purposes of determining the assets of the estate. Patrick A. Casey, P.A. v. Hochman, 963 F.2d 1347 (10 Cir. 1992).

In short, it is clear -- and defendant does not claim otherwise -- that the plaintiff's claim that defendant's negligent advice caused him to lose significant salary and other benefits as a result of his resignation as President of Britestarr belongs to David Norkin and not his estate.

II.

AT A MINIMUM, A QUESTION OF FACT IS PRESENTED AS TO WHETHER PIPER REPRESENTED NORKIN INDIVIDUALLY AND/OR OWED HIM A DUTY OF DUE CARE

Without providing any affidavit from any attorney at Piper addressing the issue, the defendant nonetheless claims that there is no question of fact but that Piper did not represent David Norkin individually. By contrast, Mr. Norkin's affidavit, submitted herewith alleges an attorney-client relationship, however, ancillary to Piper's retention by Britestarr.

In support of its claim, defendant relies exclusively on deposition testimony given by Mr. Norkin in another litigation in which he was not a party. In the context of discussing the dispute between ABB and Britestarr and Britestarr's initial retention of Piper, Norkin gave the following testimony:

Q: Who did Piper represent?

A: Britestarr Homes.

As soon as the next question was in the process of being asked, Norkin amplified his previous answer, stating:

Q: Did you have –

A: They also represented my wife and myself.

The next question and answer were:

Q: With respect to a small estate matter? [Objection omitted]

A: Their late partner, a very nice man died, he made a will for us which is paid for.

Next came the ambiguous, compound question on which defendant rests its motion for summary judgment:

> Q: Is that the only matters that anybody at Piper did for you individually, the only matter that was opened up for you individually?
>
> A: That's it.

(Def. Ex. A, p. 149) [emphasis added]. As Mr. Norkin explains in his accompanying affidavit, he understood this question to be asking whether the estate matter was the only matter for which a matter was opened up by Piper for him as an individual. This answer was, as far as Norkin knows, correct -- the advice at issue in this lawsuit was not rendered in connection with a matter Piper opened for Norkin in his individual capacity. In other words, Norkin answered the second part of the compound question. Moreover, Norkin is not an attorney and could not be expected to be familiar with the legal test for determining whether an attorney retained by a corporation was also representing the sole shareholder of the corporation in an individual capacity.

Nowhere during the deposition did the attorneys ask Mr. Norkin whether Piper gave him individual advice in connection with his resignation as President of Britestarr.

In his accompanying affidavit, Mr. Norkin attests to a conversation which he had with Kenneth Willig, a member of Piper, sometime prior to the advice which formed the subject matter of this action. In this conversation, Mr. Norkin questioned whether

Piper was representing him as well as Britestarr. Mr. Willig told Mr. Norkin that since Britestarr was a Sub S corporation and since Mr. Norkin was the sole shareholder, Piper was in effect representing Mr. Norkin individually as well as Britestarr.

Mr. Norkin's affidavit also attests to the fact that when Piper advised him to resign as President of Britestarr, he was told that his resignation would be good for Britestarr and that it would also be good for him personally.

While it is true that a party may not defeat summary judgment by contradicting an earlier deposition (at least one in the same case), this rule does not apply where there is room to reconcile the deposition and the party's subsequent testimony. As the Court of Appeals observed in Rule v. Brine, Inc., 85 F.3d 1002 at 1011 (2d Cir. 1996):

> Although a party does not show a triable issue of fact merely by submitting an affidavit that disputes his own prior sworn testimony see, e.g., Trans-Orient Marine Corp. v. Star Trading & Marine, Inc., 925 F.2d 566, 572 (2d Cir. 1991), a material issue of fact may be revealed by his subsequent sworn testimony that amplifies or explains, but does not merely contradict, his prior testimony (see e.g., Villante v. Department of Corrections, 786 F.2d 516, 522 (2nd Cir 1986), especially where the party was not previously asked sufficiently precise questions to elicit the amplification or explanation. [Emphasis added]

See also, Palazzo v. Corio, 232 F.3d 38, 43 (2d Cir. 2000) (the rule does not apply "where the latter's sworn assertion addresses an issue that was not, or was not thoroughly or clearly, explored in the deposition [citation omitted]; in determining whether an evidentiary hearing is necessary, the district court 'should not disregard the [post-deposition] testimony because of an earlier account that was ambiguous, confusing, or simply incomplete'... [citation omitted];" and see, White v. Abco Engineering Corp., 221 F.3d 293 (2d Cir. 2000); Langman Fabrics v. Graff Californiawear, Inc., 160 F.3d 106, 112 (2d Cir. 1998).

Mr. Norkin truthfully testified that "the only matter that was opened up" for him individually was the writing of a will. However, this is not inconsistent with his present assertion that in the course of representing his company in connection with giving bankruptcy advice, that the firm also advised him personally. Obviously, defendant can use plaintiff's prior testimony if it so chooses to attempt to impeach him at trial, but ultimately, the issue is a question of fact.

A principal rationale enunciated by the courts for preferring prior deposition testimony to a subsequent affidavit in the same litigation is that in a deposition, the party being deposed is represented by counsel who has the opportunity to cross-examine and correct any inaccuracy in the testimony.

See, e.g., Perma Research and Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969), a case cited by defendant (Brief, p. 15). Here, however, the deposition of Mr. Norkin which defendant relies on was not taken in this case, and the issue on which he was deposed had nothing to do with the issue in this case. Mr. Norkin was not represented by counsel, and counsel for Britestarr had no reason to cross-examine him on the issue.

Moreover, there is a substantial question under New York law as to whether as a legal matter Mr. Norkin's status as sole shareholder of Britestarr gives him standing to sue in his individual capacity for the malpractice of Piper, whether or not there was a formal retention by plaintiff of Piper's services. In Tekni-Plex, Inc. v. Meyner and Landis, 89 N.Y.2d 123, 137 (1996), the New York Court of Appeals recognized the unsettled nature of the law in this area, while at the same time seemingly indicating a preference for the view that an attorney representing a closely held corporation with a sole shareholder necessarily represented that sole shareholder as well:

> We note that some courts have held that, in the case of a close corporation, corporate representation may be individual representation as well. (see, e.g., Rosman v. Shapiro, 653 F.Supp. 1441 (S.D.N.Y); In re Brownstein, 288 Ore. 83, 87; but see Cohen v. Acorn Intl., 921 F.Supp. 1062, 1064 (S.D.N.Y.)).

* * *

> "As corporate stock ownership is concentrated into fewer and fewer hands, the distinction between corporate entity and shareholders begins to blur" and "[i]n the case of a sole-owner corporation, they may merge" (Wolfram, Modern Legal Ethics § 8.3.2, at 421).

[emphasis added] Id. at 137-38.

See, Rosman v. Shapiro, 653 F.Supp. 1441, 1445 (S.D.N.Y. 1987), where the Court noted:

> Although, in the ordinary corporation situation, corporate counsel does not necessarily become counsel for the corporation's shareholders and directors [citations omitted], where, as here, the corporation is a close corporation consisting of only two shareholders with equal interests in the corporation, it is indeed reasonable for each shareholder to believe that the corporate counsel is in effect his own individual attorney.

See, also, The Herrick Company, Inc. v. Vetta Sports, Inc., 1996 U.S. Dist. LEXIS 17841 (S.D.N.Y. 1996):

> The cases, however, show that the existence of an attorney-client relationship between the constituents of a joint venture and the attorney for the joint venture is a question of fact that depends on the nature of advice and assistance given to the alleged client by the attorney, the context in which that advice was solicited, the attorney's statements regarding this advice, and the reasonableness of the client's expectation of an

> attorney-client relationship [citations omitted].

In Good Old Days Tavern, Inc. v. Zwirn, 259 A.D.2d 300 (1st Dept. 1999), the First Department permitted a malpractice action to proceed on behalf of a president and sole shareholder of a corporation which had retained the defendant attorneys. The Appellate Division noted (259 A.D.2d at 300) that:

> While privity of contract is generally necessary to state a cause of action for attorney malpractice, liability is extended to third parties, not in privity, for harm caused by professional negligence in the presence of fraud, collusion, malicious acts or other special circumstances (see Town Line Plaza Assocs. v. Contemporary Props., 223 A.D.2d 420, Estate of Spivey v. Pulley, 138 A.D.2d 563, 564. The requisite special circumstances exist here since it is clear that plaintiff Day had a relationship with defendant attorney Zwirn tantamount to one of contractual privity. Indeed, plaintiff Day was for all intents and purposes a foreseeable third-party beneficiary of the contract pursuant to which he retained defendant attorney Zwirn to represent Good Old Days Tavern, Inc., of which Day was the president and sole shareholder and from which business he derived his livelihood. In dismissing plaintiffs' first cause of action for legal malpractice in its entirety, the motion court incorrectly found that the entire malpractice claim belonged to the corporate plaintiff...

Even in the absence of an attorney-client relationship, an attorney may be liable to a third party for negligence in the rendering of advice which the attorney knew the third party would rely upon. Prudential Insurance Company of America v. Dewey Ballantine Bushby Palmer & Wood, 80 N.Y.2d 377 (1992); Gaddy v. Sherri Eisenpress & Shatzkin & Reiss, 1999 U.S. Dist. LEXIS 19710 (S.D.N.Y. 1999). As the Court noted in Gaddy (p. 6):

> Defendant Costello characterizes his relationship as "of counsel" to Eisenpress rather than to Gaddy. (Costello Mem. Law at 7). Accordingly, Costello argues that Plaintiff's legal malpractice claim is barred for lack of strict contractual privity. See Vogel v. Lyman, 246 A.D.2d422, 668 N.Y.S.2d 162 (1st Dept. 1998); Hirsch v. Weisman, 189 A.D.2d 643, 592 N.Y.S.2d 337 (1st Dept. 1993). While Plaintiff concedes that Costello did not enter into a formal agreement, he contends that Costello agreed to represent him, appeared at meetings, and billed Gaddy for his services Sec. Am. Compl. pp 22-23, 33, 35, 64. On this record the Court cannot conclude that no privity existed. The Court further nots that even if Costello was not in strict contractual privity with Plaintiff, this does not preclude recovery for legal malpractice. See Prudential Ins. Co. v. Dewey Ballantine Bushby Palmer & Wood, 80 N.Y.2d 377, 382, 590 N.Y.S.2d 831, 605 N.E.2d 318 (1992) (creating an exception to the traditional privity requirements where the relationship between the parties is "so close as to approach that of privity"). Thus plaintiff has stated a claim for legal

> malpractice as to Defendant Costello.

Defendant cites a number of cases, all of them inapposite, in support of its claim that plaintiff's mere status as officer or director of Britestarr did not create an attorney-client relationship between Piper and Mr. Norkin. None of these cases address the factual pattern reflected in the Complaint at bar. Thus, in Tal v. Superior Vending, LLC, 20 A.D.3d 520 (2nd Dept. 2005), the plaintiff does not appear even to have claimed that he was a client of the defendant law firm. Indeed, the defendant attorney in that case actually represented another shareholder individually whose interests were adversary to plaintiff. In Weiss v. Manfredi, 83 N.Y.2d 974 (1994), the Court held merely that the children of a deceased individual and the executrix of his estate, had no attorney-client relationship with the attorneys who represented only the estate in a prior lawsuit. In Ahmed v. Trupin, 809 F.Supp. 1100 (S.D.N.Y. 1993), the Court dismissed a legal malpractice claim brought by a limited partner against an attorney who represented the limited partnership but who had no personal dealings with the limited partner. However, in dismissing the case, the Court acknowledged (809 F.Supp. at 1106) that:

> it is true that 'it is not necessary that [the] ...plaintiff plead a contractual theory of liability or that there be an express agreement between the parties for the professional to use due care in the performance of services' Cohen v.

> Goodfriend, 665 F.Supp. 152, 159 (E.D.N.Y. 1987). However, in Cohen, the lawyer represented all of the parties in the transaction and dealt directly with the plaintiff in closing his purchase of a partnership interest in a restaurant owned by the other two partners...

It should be noted, that the Court in Ahmed was apparently unaware of, and did not discuss, Prudential v. Dewey Ballantine, supra (Prudential was decided on November 19, 1992, and Ahmed on January 5, 1993). Crossland Savings FSB v. Rockwood Insurance Company, 700 F.Supp. 1274 (S.D.N.Y. 1988), also cited by defendant, predated Prudential.

Defendant also cites Griffin v. Anslow, 17 A.D.3d 889 (3d Dept. 2005). In that case, a dispute had arisen between plaintiffs and their co-shareholder, and plaintiffs had actually retained attorneys other than defendants to represent them on that and other matters as to which they subsequently claimed they were represented by defendants. The opinion is devoid of any reference to any advice which defendants gave to plaintiff. By contrast at bar, the complaint expressly states the matter as to which plaintiff was represented by defendant and expressly states the specific advice given to plaintiff personally by defendant. In Berkowitz v. Fischbein, Badillo, Wagner & Harding, 7 A.D.2d 385 (1st Dept. 2004), also cited by defendant, the plaintiff was a former partner in a limited liability corporation which constructed condominium units. In this malpractice case, the plaintiff claimed that defendant attorney for the limited liability corporation was negligent in failing to remove his name from a list of members or managers of the corporation, after he had divested himself of his interest in the corporation. Thus, at the time of the defendant's alleged negligence, the plaintiff had no connection with the defendant's corporate client.

In a footnote (Brief, p. 15), defendant cites several cases to the effect that Piper did not represent Norkin merely because it represented the corporation of which Norkin was an officer and an alleged shareholder. Although plaintiff at bar does not rest his malpractice claim on a claim that his status as sole shareholder makes him automatically the defendant's client, it should be noted that none of the cases cited by defendant involve a sole shareholder. As noted above, recent New York case law indicates that plaintiff's status as sole shareholder of Britestarr may indeed provide a legal basis for asserting a relationship sufficient to give rise to a malpractice claim.

III.

THE DEFENDANT IS NOT ENTITLED TO PARTIAL SUMMARY JUDGMENT ON ITS CLAIM THAT NORKIN WOULD HAVE REJECTED THE ABB'S 2002 SETTLEMENT OFFER

Defendant seeks to dismiss, pre-Answer and pre-discovery, that portion of plaintiff's Complaint which alleges that defendant committed malpractice and violated its fiduciary duty by failing to disclose to plaintiff an offer by ABB in March 2002 to settle a lawsuit with plaintiff and Britestarr and to pay one million dollars to extend an option to purchase Britestarr's property. Defendant claims that since plaintiff had rejected the same offer a year earlier, it would have rejected it again. In essence, defendant claims, no harm, no foul. Defendant's claim that there is no material issue of fact as to whether plaintiff would have accepted the offer in 2002 had defendant not committed malpractice should be rejected.

For purposes of defendant's motion for summary judgment, the defendant does not deny the following allegations in the Complaint:

-- In the Spring 2002, ABB Equity Ventures, Inc. ("ABB") advised defendant Piper that ABB was willing to pay to Britestarr one million dollars for an extension of its option to purchase Britestarr's land in the Bronx for one year (Complaint, ¶17).

-- Acceptance of this offer by Norkin and Britestarr would have enabled Norkin and Britestarr to settle ABB's lawsuit against Norkin and Britestarr (id).

-- Acceptance of the offer would have benefitted Britestarr and Norkin by giving ABB time to acquire the permits necessary to consume purchase of the property (Complaint, ¶18).

-- The one million dollar payment by ABB would have ensured Britestarr's ability to operate for the foreseeable future without the need to consider bankruptcy (Complaint, ¶18).

-- Although ABB's one million dollar option/settlement offer was clearly beneficial to both Norkin and Britestarr, Piper failed even to advise Norkin of the offer (Complaint, ¶18).

-- Piper's conduct in failing to advise the plaintiff of ABB's March 2002 settlement proposal constituted malpractice (Complaint, ¶33).

Notwithstanding the foregoing allegations, none of which is denied for the purposes of defendant's motion, defendant claims that it is entitled to partial summary judgment with respect to this claim because (according to Piper) Mr. Norkin would have rejected the settlement in 2002 had defendant informed him of it. Defendant claims that there is no material issue of fact because Mr. Norkin "hated" ABB and had rejected the same offer a year earlier in January 2001.

The simple answer to the defendant's claim is that -- as set forth in Mr. Norkin's accompanying affidavit -- there were several material changes in circumstances between January 2001, when the offer was first made, and March 2002, when (unbeknownst to Mr. Norkin) it was made again. Under the changed circumstances, Mr. Norkin would have accepted ABB's offer in 2002, had Piper advised him that it was still available. At the very least, a question of fact is presented.

As Mr. Norkin attests in his affidavit, the following changes in circumstances occurred between early 2001 and March 2002:

1. In January 2001, another prospective purchaser of the property, Mirant, was actively pursuing a purchase. Piper had advised Mr. Norkin that ABB was not serious and would never purchase the property, but that Mirant was a viable alternative (unbeknownst to Mr. Norkin, Piper also represented Mirant at the time). Thus, Mr. Norkin had an incentive to allow ABB's option to expire so that the property could be sold to Mirant. In the Fall 2001, however, Mirant encountered serious financial difficulties and dropped out as a potential purchaser for the Bronx property. As of March 2002, there were no other purchasers who had been identified other than ABB.

2. Shortly after Mr. Norkin rejected ABB's offer to extend the option in early 2001, ABB filed a lawsuit against Britestarr and Mr. Norkin. Obviously, once Mr. Norkin actually became a defendant in a lawsuit, he and a far greater incentive than previously to settle his differences with ABB.

3. Most important, by the Spring of 2002, Britestarr was out of cash and Piper was advising Mr. Norkin that he had no alternative but to put Britestarr into bankruptcy and to resign as President in Britestarr. This dire situation did not exist in 2001. If Mr. Norkin knew that he could have avoided bankruptcy and

resignation by settling with ABB and receiving $1,000,000, he would have done so.

While defendant cites Mr. Norkin's deposition in the Britestarr malpractice case to show that Mr. Norkin had rejected the 2001 settlement offer, the defendant fails to cite a portion of the same deposition in which Mr. Norkin unequivocally testified that he would have accepted the same offer in 2002:

> Q: Let me ask it this way. Did anyone at Piper Rudnick, Mr. Colucci, Mr. Willig, Mr. Langlois, Mr. Califano, Mr. Walsh tell you before they drafted the papers for your resignation and placing Britestarr Homes into bankruptcy, did anyone of them tell you that in that time period, the spring of 2002, ABB was still willing to renew and extend the option agreement, pay money to Britestarr Homes and keep in place the same option agreement, or the financial terms, the same financial terms of the original option agreement?
>
> A. Well, obviously, if I knew about it we wouldn't have gone into Chapter 11. I was not made aware of this and I'm very chagrined to hear this.

[Deposition of David Norkin, 10/17/04, p. 16-17]

In short, Mr. Norkin's rejection of the ABB settlement offer in early 2001 was in no way predictive of how Mr. Norkin would have responded to the same offer a year later.

Plaintiff, in his affidavit, has presented several reasons why, notwithstanding his "hatred" for ABB and his view in

2001 that the settlement offer was inadequate, he would nonetheless have accepted the offer in 2002 -- when the choice became: accept the offer (and get $1,000,000 which could be used to pay Norkin's salary) or put Britestarr into bankruptcy and resign as President. Of course, the issue is not susceptible and objective proof, precisely because defendant deprived plaintiff of the opportunity to make a choice. Defendant now asks the Court to hold, as a matter of incontrovertible fact, that had it performed its duty and disclosed the offer in 2002, plaintiff would have rejected it. The Court should decline the invitation.

As the Court held, reversing a grant of summary judgment, in R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 58 (2nd Cir 1997):

> ...even where the surrounding circumstances indicate what has been termed, perhaps unfortunately, "implausibility," at the summary judgment stage the court should not "weigh" the evidence in the same manner as a trier of fact...At summary judgment, the court must still construe the reasonable inferences in favor of the non-moving party. "In evaluating the sufficiency of the nonmoving party's evidence...courts must still proceed very cautiously," even in the fact of "implausible" claims. Brady v. Town of Colchester, 863 F.2d 205, 211 (2d Cir. 1988). "If reasonable minds could differ as to the import of the evidence, "as we have previously explained, "and if...there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be

> drawn, the moving part simply cannot obtain a summary judgment." [Citations omitted].

See, also, Stichting v. Schrieber, 407 F.3d 34 (2nd Cir. 2005), where the court denied summary judgment in a legal malpractice case, noting that while the plaintiff "may well face an uphill battle in persuading the civil jury in the instant case...to resolve at the summary judgment stage, and before [the witness] testifies, the question of whether the reasonable jury might believe [the witness] would, we think, amount to credibility determination that we are not entitled to make." At bar, Mr. Norkin's explanation as to why, having rejected a settlement offer in 2001, he would have accepted the same offer a year later, is not implausible, and there is no reason to suppose that he faces "an uphill battle." However, even if, for any reason, the Court was skeptical of Mr. Norkin's claims, this would not entitle defendant to be awarded summary judgment.

Of course, "summary judgment is generally inappropriate where questions of intent or state of mind are implicated." Gelb v. Board of Elections, 224 F.3d 148, 157 (2nd Cir. 2000). Here, defendant would have the Court substitute its view for that of the trier of fact as to whether plaintiff would or would not have accepted a settlement offer, having rejected the same offer a year earlier under different circumstances.

Conclusion

The defendant's motion for summary judgment should, in all respects, be denied.

Dated: New York, New York
December 27, 2005

Respectfully submitted,

Litman, Asche & Gioiella, LLP
Attorneys for Plaintiff

By:________________________________
Richard M. Asche (RMA-7081)

45 Broadway - 30th Floor
New York, New York 10006
(212) 809-4500